IN THE
SUPREME COURT OF MISSOURI

No. 84563

SIX FLAGS THEME PARKS, INC.,

APPELLANT,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

RESPONDENT.

ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE SHARON M. BUSCH, COMMISSIONER

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The principal issues before the Court involve the construction of §§ 144.020.1(2) and (8), 144.020.2, and 144.030.1.[1] In particular, the questions presented are: (1) whether interstate sales taxable under §§144.020.1(2) and 144.020.2 are subject to the sales tax in view of the in commerce sales tax exemption in § 144.030.1; and, (2) whether the rental receipts of video games are excluded from sales tax under § 144.020.1(8) when sales tax was already paid at the time the video games were purchased.

Thus, the Court's review of this case will necessarily involve the construction of §§ 144.020.1(2) and (8), 144.020.2, and 144.030.1, which are revenue laws of the State of Missouri. This Court has exclusive jurisdiction over these issues pursuant to Article V, §3 of the Missouri Constitution.

[1] All statutory citations are to the 1994 Revised Statutes of Missouri, the version in effect at the beginning of the tax periods at issue herein. Although none of the applicable sections has been amended since then, Section 144.010.1(8) is now codified as Section 144.010.1(10), RSMo 2000.

STATEMENT OF FACTS

Introduction

The parties submitted this matter to the Commission on a stipulation of facts (L.F. 10-32, 33). The Commission adopted the stipulation of facts as its findings of fact (L.F. 34-39). The Commission decision (L.F. 33-46) is attached hereto as an appendix. The facts are not in dispute.

Appellant Six Flags Theme Parks, Inc. ("Six Flags") owns and operates an amusement theme park in Eureka, Missouri (the "Eureka Facility"). In addition to the Eureka Facility, Six Flags owns and operates several amusement parks throughout the United States (L.F. 34). Six Flags is affiliated with other amusement parks using the "Six Flags" name that are not owned by Six Flags ("Related Facilities") (L.F. 34). These amusement parks, like the Eureka Facility, are places of amusement containing rides like roller coasters, carnival games, video games, and entertainment like diving exhibitions and stage acts (L.F. 34). Although each of the amusement parks owned by Six Flags separately accounts for its activities, the operations of all of the amusement parks owned by Six Flags contribute to its overall profit (L.F. 34). This appeal concerns Six Flags' claim for refund of sales tax it remitted on its in commerce retail sales and on rentals of video games for which sales or use tax had already been paid when the games were acquired. The claim periods were July 1995 through November 1998 (the "Tax Periods").

Tickets for Eureka Facility

All patrons who were admitted to the Eureka Facility were admitted by use of either single-day admission tickets ("Admission Tickets"), or season passes ("Season Passes"). Season Passes sold by the Eureka Facility entitled the holders to unlimited visitation throughout the scheduled operating season (a set period during a calendar year) to the Eureka Facility, and any other Six Flags theme parks (L.F. 34). With the exception of tickets purchased under the Joint Ticket Program with the Chicago Facility (as explained below), Admission Tickets sold by the Eureka Facility entitled the holders only to admission to the Eureka Facility for one day. Each such Admission Ticket holder gained admission to the Eureka Facility by presenting the ticket at the Facility's gate. The attendant kept the ticket and allowed the customer to enter the facility (L.F. 35).

In 1997 and 1998, the Eureka Facility participated in a Joint Ticket Program with Six Flags' facility in Chicago, Illinois ("Chicago Facility") (L.F. 35). The two facilities sold tickets that entitled the ticket-holder to admission at either the Eureka Facility or the Chicago Facility for one day (L.F. 35). The two facilities sold these tickets primarily to resellers who, because of their location between the two facilities, were likely to have buyers wanting tickets to either facility (L.F. 35). Each such admission ticket holder gained admission to the facility by presenting the ticket at the facility's gate (L.F. 35). The attendant kept the ticket and allowed the patron to enter the facility (L.F. 35).

Sales of Admission Tickets by Eureka Facility

The Eureka Facility sold both Season Passes and Admission Tickets in two ways. The first method was by sales to customers who purchased Season Passes and Admission Tickets while physically present at the Eureka Facility (L.F. 35). The second method by which the Eureka Facility sold Season Passes and Admission Tickets was by mail or phone (L.F. 35). The Eureka Facility accepted payment for Season Passes and/or Admission Tickets by credit card charge, or by check or money order mailed to Six Flags in Eureka (L.F. 35). Six Flags sent the purchased Season Passes and/or Admission Tickets by Courier (L.F. 35). Some of these sales were customers with a Missouri mailing address; some of these sales were to customers with mailing addresses outside of Missouri (L.F. 35-36).

After an Admission Ticket or Season Pass was physically transferred to **and received** by a customer, the risk of theft or loss was borne by the customer (L.F. 36); once the Admission Ticket or Season Pass was **actually received** by the customer, Six Flags had no obligation to replace lost or stolen Admission Tickets or Season Passes (L.F. 36). For Tickets and Passes delivered to customers by mail, Six Flags would replace those that were lost or stolen **prior to delivery** to the customer (L.F. 36). Thereafter, Six Flags had no obligation to replace such Tickets and Passes because the risk of theft or loss was borne by the customer (L.F. 36).

Use of Season Passes and Admission Tickets

A purchaser of a Season Pass was required to "register" the Season Pass at the Six Flags facility from which it was purchased (L.F. 36). The holder could then use the Season Pass at that facility's gate to gain admission for the first time in a season (L.F. 36). Unlike Admission Tickets, Season Passes were retained by the customers after admission to the facility (L.F. 36). After registration of the Season Pass, its holder could use the pass at all Six Flags facilities without additional registration or payment (L.F. 36). Some of the Eureka Facility's purchasers of Season Passes that initially used them at the Eureka Facility also used them at other non-Missouri facilities (L.F. 36). However, the number of purchasers that used Season Passes at facilities outside of Missouri could not be readily determined (L.F. 36).

Some Admission Tickets sold under the Joint Ticket Program by the Eureka Facility, directly or through resellers, were not used at the Eureka Facility because they were used at the Chicago Facility and some Admission Tickets sold under the Joint Ticket Program by the Chicago Facility, directly or through resellers, were used at the Eureka Facility (L.F. 36). For the Tax Periods, Six Flags could not determine how many Admission Tickets were sold by the Eureka Facility and used at the Chicago Facility or sold by the Chicago Facility and used at the Eureka Facility (L.F. 36-37).

The Director's policy, by regulation and otherwise, is to collect sales tax on the gross receipts paid to places of entertainment and amusement for tickets to enter such places, **whether or not the purchaser of the tickets is ever admitted to the place of entertainment or amusement** (L.F. 39-40). The Director grants no refunds of the tax

remitted on gross receipts from the sale of tickets that are not used unless the seller of the tickets grants refunds to the buyers of the unused tickets (L.F. 39-40). The Director's policy is to not collect sales tax on gross receipts received in Missouri from the sale of tickets to enter places of amusement and entertainment that are located outside of Missouri because the places of amusement and entertainment are not located within Missouri (L.F. 39-40).

Video Games

The Eureka Facility contained video games that allowed customers to test their skill level by playing against a machine ("Video Games") (L.F. 37). The Video Games were items of tangible personal property that were powered by electric current; they needed nothing else to operate (L.F. 37). Video Games were similar to, but not exactly the same as, pinball games and in-home video entertainment systems such as Sega, Sony PlayStation and Nintendo (L.F. 37). One difference was that Video Games contained a built-in video monitor, whereas in-home systems were typically attached to a television (L.F. 37).

Six Flags powered the Video Games by plugging them into an electric socket at the Eureka Facility (L.F. 37). A customer "played" a Video Game by putting the requisite amount of cash in the Video Game to play a "game" (L.F. 37). Only during the time that a customer had purchased the right to "play" a Video Game did that customer have the exclusive right to play the Video Game (L.F. 37). Six Flags' customers paid the requisite fee to use the Video Games and were entitled to no benefit other than the temporary and exclusive right to play the Video Game. The customers were not eligible to win any prize

or to use any other property in exchange for paying the requisite fee to play a Video Game (L.F. 38).

The Video Game could not be removed by the customer from its location (L.F. 37). Six Flags' only activities with respect to Video Games were to supply them with electric power by plugging them into electric sockets and to remove cash from them on a periodic basis (L.F. 37-38).

Six Flags did not own the Video Games (L.F. 38). The owner of the Video Games ("Owner") paid Missouri sales or use tax on the purchase of the Video Games (L.F. 38). Six Flags had a contract with the Owner that permitted the Owner to place the Video Games at the Eureka Facility (L.F. 38). Pursuant to the contract with the Owner, Six Flags and Owner split the receipts from the Video Games evenly (L.F. 38-39). Six Flags collected and remitted all sales tax on the Video Game receipts pursuant to its contract with Owner (L.F. 38-39).

Collection and Remission of Missouri Sales Taxes

During the Tax Periods, Six Flags collected and remitted Missouri and related local sales taxes on all of its retail sales of Season Passes and Admission Tickets by the Eureka Facility, including those where the buyers were located outside of Missouri, ordered the Season Passes and Admission Tickets by mail or phone, and Six Flags mailed the Season Passes and Admission Tickets to them (L.F. 38-39). During the Tax Periods, Six Flags collected and remitted Missouri and related local sales taxes on all Video Game receipts at the Eureka Facility (L.F. 38-39).

Refund Claim

Six Flags timely filed a claim for refund of Missouri sales and use taxes paid during the Tax Periods on its retail sales made in commerce and upon rental receipts for video games upon which sales/use tax was already paid when the games were purchased (L.F. 40). The Director denied the claim and Six Flags appealed that denial to the Administrative Hearing Commission ("Commission") (L.F. 40). The parties filed a detailed stipulation of facts and waived a hearing (L.F. 40).

Commission Decision

The Commission adopted the parties' detailed stipulation of facts as its findings of fact and, based upon its conclusions of law, denied Six Flags' refund claim. First, it concluded that the claimed in commerce retail sales were sales of a service and not of tangible personal property and effectively concluded that the in commerce exemption in Section 144.030.1 could not apply to the retail sale of a service that, if rendered at all, was rendered in Missouri (L.F. 42-43). Second, the Commission concluded that Six Flags' retail sales transactions involving the Video Games did not qualify for the prior tax payment exclusion under section 144.020.1(8) because the "essence of the [retail sales] transaction" was not a lease or rental of the machines, but rather "the ability to indulge in the amusement" afforded by using the machines (L.F. 45).

STATEMENT OF THE ISSUES

Section 144.020.1 imposes the Missouri sales tax on retail sales of tangible personal property and certain enumerated services. Sections 144.010.1(8), 144.020.1(2), and 144.020.2 include within Missouri "sale[s] at retail" the sale of "admission tickets, cash admissions, [and] charges and fees to or in a place of amusement[.]" Section 144.030.1 exempts from the tax "such retail sales as may be made in commerce between this state and any other state[.]" Six Flags sells admission tickets to customers in states other than Missouri by mail or common courier. Is the retail sale made in commerce between this state and any other state of admission tickets, cash admissions, [and] charges and fees to or in a place of amusement exempt from tax under Section 144.030.1?

Section 144.020.1(8) excludes from the sales tax the rental or lease of tangible personal property upon which sales tax was remitted upon its purchase. When the Video Games at issue were purchased, sales or use tax was paid on their purchase. Are the rentals of the Video Games excluded from sales tax under Section 144.020.1(8)?

STANDARD OF REVIEW

The decision of the Commission shall be upheld: (1) if it is authorized by law; (2) if it is supported by competent and substantial evidence upon the whole record; (3) if no mandatory procedural safeguards are violated; and (4) where the Commission has discretion, it exercises that discretion in a way that is not clearly contrary to the Legislature's reasonable expectations. Section 621.193, RSMo; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996). The first two standards are at issue before this Court.

Finally, this Court's interpretation of Missouri's revenue laws is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000).

POINTS RELIED ON

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE DENIAL OF THE REFUND CLAIM BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT APPELLANT'S SALES AT RETAIL TO OUT-OF-STATE CUSTOMERS OF ADMISSION TICKETS ORDERED BY PHONE OR MAIL, AND DELIVERED OUTSIDE MISSOURI BY UNITED STATES MAIL OR COURIER, ARE EXEMPT IN COMMERCE SALES UNDER SECTION 144.030.1.

Lynn v. Director of Revenue, 689 S.W.2d 45 (Mo. banc 1985);

Branson Scenic Railway v. Director of Revenue, 3 S.W.3d 788 (Mo. App., W.D. 1999);

Western Trailer Service, Inc. v. Lesage, 575 S.W.2d 173, 174 (Mo. banc 1978);

Section 144.030.1;

Section 144.020.1(2); and

Section 144.010.1(8).

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE DENIAL OF THE CLAIM FOR REFUND BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT APPELLANT'S RENTAL OF VIDEO GAMES IS EXPRESSLY EXCLUDED FROM SALES TAX BY SECTION 144.020.1(8).

Westwood Country Club v. Director of Revenue, 6 S.W.3d 885 (Mo. banc 1999);

Dean Machinery Co. v. Director of Revenue, 918 S.W.2d 244, 245-46 (Mo. banc 1996);

Ryder Student Transportation Services, 896 S.W.2d 633 (Mo. banc 1995); and

Section 144.020.1(8).

ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE DENIAL OF THE REFUND CLAIM BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT APPELLANT'S SALES AT RETAIL TO OUT-OF-STATE CUSTOMERS OF ADMISSION TICKETS ORDERED BY PHONE OR MAIL, AND DELIVERED OUTSIDE MISSOURI BY UNITED STATES MAIL OR COURIER, ARE EXEMPT IN COMMERCE SALES UNDER SECTION 144.030.1.

Introduction

Six Flags sold admission tickets to out-of-state customers who ordered the tickets by phone or mail and received the tickets from Six Flags' Eureka Facility by mail or courier. The risk of loss of the ticket was upon the customers once the tickets **were actually received** by the customers at their locations outside of Missouri. Thus, importation is clearly an essential feature of these retail sales transactions.

Regardless whether these retail sales are of tangible personal property or of a service, these ***retail sales*** are exempt under Section 144.030.1, which exempts "such retail sales as may be made in commerce between this state and any other state[.]" The Commission concluded, however, that the "true object" of the retail sale was a service, and not tangible personal property, and effectively concluded that the in commerce exemption applies only to "retail sales [of tangible personal property]" (L.F. 42-43). The

Commission's legal conclusion in this regard amounts to an amendment of the exemption and is not supported by the plain meaning of the exemption or by this Court's construction of the exemption.

The Sales of Tickets and Passes are In Commerce Sales

In *Western Trailer Service, Inc. v. Lesage*, 575 S.W.2d 173, 174 (Mo. banc 1978), this Court concluded that an in commerce retail sale under Section 144.030.1 included "a dealing between persons of different states in which importation … (was) an essential feature or … (formed) a component part of the transaction" (citing *City of Eldorado Springs v. Highhill*, 188 S.W. 68, 70 (Mo. 1916)). Six Flags' sales of tickets to purchasers located outside of Missouri clearly involved importation by a non-Missouri customer from a Missouri seller through the mail or by courier and are thus exempt in commerce sales. But the Commission erroneously concluded that the in commerce exemption applied only to sales of tangible personal property and that Six Flags' sales were of a service.

The Commission claimed to rely on *Bratton Corporation v. Director of Revenue*, 783 S.W.2d 891, 893 (Mo. banc 1990). There, however, this Court concluded that the focus of the in commerce exemption was on the ***retail sale***. *Id*. at 893. Because the retail sale there involved tangible personal property, this Court concluded that "the existence of a retail sale depends on the transfer of title or ownership." Because the transfer of title did not occur in commerce between the states, this Court denied the exemption: "[n]o component of any of the sales transaction w[as] dependent upon the transportation of goods into or out of Missouri." *Id*. at 894. Here, if the retail sales of Admission Tickets and

Season Passes are deemed the sale of tangible personal property, they are exempt in commerce sales under *Bratton* since title clearly transferred outside of Missouri where the purchasers took possession and the risk of loss transferred. Likewise, if the sales of Admission Tickets and Season Passes are deemed to be of a service, and not of tangible personal property, then the focus under *Bratton* is whether the retail sales of that service were in commerce. Again, the answer is that the retail sales are exempt since those retail sales of the right to be admitted to the amusement park were sales made in commerce and involving an element of importation. In this case, the Commission misapplied *Bratton*, concluding that because, in its opinion, no "goods" are involved in this case, there can be no transfer of title and thus no exemption (L.F. 42-3). *Bratton* did not, however, conclude that the in commerce exemption was limited to retail sales of tangible personal property.

Furthermore, the Commission's interpretation is not supported by a plain reading of Section 144.030.1 or by *Lynn v. Director of Revenue*, 689 S.W.2d 45 (Mo. banc 1985) and *Branson Scenic Railway v. Director of Revenue*, 3 S.W.3d 788 (Mo. App., W.D. 1999).

The express terms of Section 144.030.1 belie the Commission's conclusion limiting the in commerce exemption to sales of tangible personal property. "[A] court may not add words by implication to a statute that is clear and unambiguous." *Dean Machinery Co. v. Director of Revenue*, 918 S.W.2d 244, 245-46 (Mo. banc 1996). But that is exactly what the Commission did in this case. The exemption applies to "such retail sales as may be made in commerce[.]" Nowhere is there any indication that the exemption applies only to a retail sale of ***tangible personal property***. If the legislature had intended to limit the exemption to a ***retail sale of tangible personal property***, "the legislature was free to use

clear language to do so[.]" *Ryder Student Transportation Services, Inc. v. Director of Revenue*, 896 S.W.2d 633 (Mo. banc 1995). But the legislature did not use any words limiting the in commerce exemption to sales of tangible personal property. In fact, Section 144.010.1(8) is clear that a "[s]ale at retail" is not limited to a sale of tangible personal property, but includes also a sale of any service enumerated in Section 144.020. The legislature is presumed to know the law. *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988). The legislature is thus presumed to have known of its definition of a "[s]ale at retail," and to have intended that term to include sales of specific services when it used that term in Section 144.030.1.

Therefore, the real issue in this appeal is whether Six Flags' retail sales of Admission Tickets and Season Passes were made in commerce, and not, as the Commission erroneously concluded, whether those sales were of tangible personal property.

In *Lynn v. Director of Revenue*, 689 S.W.2d 45 (Mo. banc 1985), this Court addressed an issue similar to the one at bar. There, the question was whether the sale of Missouri River boat excursions that embarked and disembarked from the same point in Missouri, but that crossed into Kansas, were in commerce sales. In upholding the tax, the Court emphasized that the retail sale transaction was consummated in Missouri, regardless of where the services were provided:

> "The obligation to pay for the excursions arise[s] solely in Missouri. On regularly scheduled tours, passengers purchase tickets as they board the taxpayer's vessel while it is moored in Missouri. All contracts and deposits are sent to the home office in Missouri for

> acceptance. The taxpayer may occasionally collect the final portion of a fare while on the Kansas side of the Missouri River, but the duty to pay for the fare arises before the vessel leaves the Missouri-based dock. It is clear that the admission fees charged by the taxpayer are solely Missouri retail sales[.]" *Id.*

Lynn, like the case at hand, involved a retail sale under Section 144.020.1(2). This Court in *Lynn* understandably did not consider whether the ***retail sale*** was of tangible personal property or of a service since the in commerce exemption does not distinguish between sales of property and sales of services. Had this Court wished to distinguish sales of property from services, *Lynn* would have been the case to do so since, unlike here, the retail sales apparently involved cash admissions having no tangible component. Rather, the Court properly focused on what was important—whether there was an interstate retail sale—and not on the nature of what was sold.

The Western District Court of Appeals used the same analysis in *Branson Scenic Railway v. Director of Revenue*, 3 S.W.3d 788 (Mo. App. W.D. 1999). That case involved retail sales of admission tickets for a railway excursion that traveled into northern Arkansas. The Court of Appeals correctly determined that the case turned on the nature of the retail sale, and that because the sale was of an admission ticket by a Missouri seller to a Missouri consumer in Missouri, the transaction was not an in commerce sale. That Court, like this Court in *Lynn*, did not even consider the issue the Commission thought important whether the retail sale was of tangible personal property.

The clear implication of *Branson* and *Lynn* is that had the retail sales transactions at issue been sales in commerce between states, as here, the sales would have been exempt. Six Flags' retail sales of the Admission Tickets and Season Passes were in fact made in commerce because those sales clearly involved "a dealing between persons of different states [Six Flags in Missouri and its customers outside of Missouri] in which importation … (was) an essential feature or … (formed) a component part of the transaction." *Western Trailer Services, supra*. Therefore, Six Flags' sales at issue qualified for exemption under Section 144.030.1.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE DENIAL OF THE CLAIM FOR REFUND BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT APPELLANT'S RENTAL OF VIDEO GAMES IS EXPRESSLY EXCLUDED FROM SALES TAX BY SECTION 144.020.1(8).

Introduction

Section 144.020.1(8) provides an express exclusion from sales tax for the rental of tangible personal property where tax has already been paid when the property was purchased. Six Flags qualifies for this express exclusion against double taxation on its Video Game rental receipts since tax was paid at the time the Video Games were purchased. Notwithstanding the clarity of Section 144.020.1(8), the Commission concluded that Six Flags did not qualify for this express exclusion because the "essence of the transaction" was the "ability to indulge in the amusement" that the temporary possession of the Video Game provided (L.F. 45). The Commission's legal conclusion in this regard is unsupported by the plain language of Section 144.020.1(8) or by this Court's decision in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999).

Six Flags' Video Game Rental Receipts Qualify for the Exclusion Against Double Taxation

Section 144.020.1(8) provides that: "if the lessor … of any tangible personal property had previously purchased the property … and the tax was paid at the time of purchase, the lessor … shall not apply or collect the tax on the subsequent lease … receipts from that property." This exclusion against double taxation furthers an important principle in Missouri's sales and use tax system—to tax "property only once, [and] not at every transaction in the stream of commerce." *Dean Machinery,* 918 S.W.2d at 245-46.

In *Westwood Country Club*, this Court determined that this express exclusion from double taxation "trumped" Section 144.020.1(2), which imposes the so-called amusement tax. This Court reasoned that Section 144.020.1(8) was controlling where there is overlap with Section 144.020.1(2) because the former section is more specific than the latter. Accordingly, this Court determined that cart rental fees at a country club were expressly excluded from tax because tax had already been paid when the lessor acquired the carts even though the country club was admittedly a place of amusement.

The Commission surprisingly ignored *Westwood*'s conclusion, merely paying lip service to this Court's holding while ignoring its application. The Commission focused instead on whether the rental of the tangible personal property was for the purpose of "indulg[ing] in … amusement" (L.F. 45). Again, the Commission read words into Section 144.020.1(8) that are simply not there. In its effort to double-tax the Video Games, the Commission read the exclusion as: "the lessor … shall not apply or collect the tax on the subsequent lease … receipts from that property [***unless the lessee uses that property for***

amusement.]" If the legislature had intended to so limit the exclusion, "the legislature was free to use clear language to do so[.]" *Ryder Student Transportation Services,* 896 S.W.2d 633 (Mo. banc 1995). The legislature did not and the "court may not add words by implication to a statute that is clear and unambiguous." *Dean Machinery,* 918 S.W.2d at 246.

Furthermore, the Commission's conclusion finds no support in *Westwood Country Club*. This Court did not say the cart rentals were nontaxable because driving golf carts was not amusing.[2] Quite to the contrary, this Court emphasized that the plain purpose of the exclusion was to prevent double taxation whether that double taxation occurs at a place of amusement or elsewhere:

> "We, however find that section 144.020.1(8) is a more specific statute than section 144.020.1(2) in that it expressly deals with the lease or rental of personal property upon which sales tax has already been paid. Since we apply a more specific statute over a more general statute when both address the same issue, we apply section 144.020.1(8) to the controversy.
>
> "Missouri's sales tax laws were designed to impose a tax on the retail sale or lease of personal property. Since Westwood paid a sales tax on the golf carts when it purchased or leased them, the goal

[2] Some might argue that driving the golf cart is the only amusing thing that happens on a golf course.

of taxing the purchase once and only once has been met." (citations omitted)

While practically ignoring this Court's decision in *Westwood*, the Commission placed great emphasis on one of its own decisions, *Tower Tee Golf, Inc. v. Director of Revenue*, No. 00-0686 RV (Mo. Admin. Hrg. Comm. 2001) (L.F. 45). First of all, Commission decisions have no precedential effect. *Central Hardware Co. v. Director of Revenue*, 887 S.W.2d 593 (Mo. banc 1994). Second, *Tower Tee* is clearly distinguishable. The issue in *Tower Tee* was whether a charge to use the golf driving range, paid by obtaining a bucket of range golf balls, was a charge for rental of tangible personal property (golf balls) under Section 144.020.1(8). The Commission concluded that Tower Tee's patrons were not paying a fee for the rental of golf balls. Instead, the bucket of golf balls was simply a "proxy for admission" to use the expansive real property constituting the driving range. Since the payment was primarily for the use of real, not tangible personal, property, the payment at issue was not excluded from tax by Section 144.020.1(8) as a rental or lease ***of tangible personal property***.

In this case, however, Six Flags' customers' payments to use the Video Games were made for one purpose and one purpose only—to temporarily possess and use items of tangible personal property—the Video Games. There is no question that the rental receipts did not serve as a "proxy for admission" since all of Six Flags' patrons had already paid for admission and had been admitted to the Eureka Facility. The Video Game rentals are akin to the golf cart rentals at issue in *Westwood*, and in sharp contrast to Tower Tee's charge to

use its driving range. In short, Six Flags' rental receipts for rentals of the Video Games are excluded from sales tax by Section 144.020.1(8).

CONCLUSION

For all of the foregoing reasons, Six Flags' receipts for its in commerce retail sales are exempt from sales tax under the in commerce exemption in Section 144.030.1 and its receipts for rental of Video Games are excluded from sales tax under the exclusion against double taxation in Section 144.020.1(8). Accordingly, this Court should reverse the Commission with instructions that Six Flags' refund claim be sustained.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this _____ day of August, 2002, to Ron Molteni, Assistant Attorney General, Missouri Attorney General's Office, P.O. Box 899, Jefferson City 65102.

_____

CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 5,613 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

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